

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

NICOMEDES TUBAR, III,

Plaintiff,

v.

JASON CLIFT; and THE CITY OF KENT,
WASHINGTON, a municipal corporation,

Defendants.

No. C05-1154JCC

DEFENDANTS' MOTION
FOR PARTIAL SUMMARY
JUDGMENT

**NOTE ON MOTION CALENDAR:
APRIL 7, 2006**

I. RELIEF REQUESTED

This is Defendants City of Kent's and Jason Clift's Motion for Summary Judgment requesting dismissal of plaintiff's federal civil rights claims because no violation of plaintiff's civil rights occurred. In the alternative, if a violation can be made out on these facts, Clift is entitled to qualified immunity from suit.

This lawsuit arose from an incident which occurred just after midnight on June 26, 2003, during which Officer Jason Clift fired three shots at a stolen vehicle being driven at him by Heather Morehouse. Plaintiff Nicomedes Tubar, a passenger in the vehicle, was inadvertently injured when a bullet fired at Ms. Morehouse missed and struck plaintiff in the shoulder. Ms. Morehouse was prosecuted and pleaded guilty to assaulting Officer Clift.

II. STATEMENT OF FACTS

A. Defendant Officer Clift's Statement.

Shortly before midnight on June 25, 2003, Officer Clift was on routine patrol in the City of Kent driving a fully marked police vehicle and wearing a Kent Police Department uniform. Some months previously, a business owner in the neighborhood had reported a stolen vehicle, and the owner had asked for additional patrols of his parking lot due to this theft experience. Officer Clift drove into the parking lot area and located a 2001 Kia automobile parked near a chain link fence in the lot. The car was parked near a business complex the upper floor of which contained rental apartments. A records check of the license plate showed the car had been reported stolen one day before. *Declaration of Jason Clift, Exhibit A, p. 1.*

Officer Clift approached the vehicle and noticed a glass pipe on the front passenger seat like that used to smoke illegal narcotics. He also noticed a license plate on the passenger side floor. He checked the front of the vehicle and observed that the front license plate was missing. Officer Clift knew from his experience with stolen vehicles that it was common for car thieves to remove front license plates. He noted that the hood of the vehicle was still warm, indicating that it had recently been driven. *Id.*

Officer Clift advised dispatch of his location, and the dispatcher confirmed that the vehicle was indeed stolen. He decided to watch the vehicle for a while since it had only recently been driven. He put a small mechanical device known as a "rat trap" under the passenger side tire. This device is used to flatten a vehicle tire when it is driven over. He moved his patrol car to a location that was out of sight and waited in a corner of the lot where he could observe the car without being seen. *Id.*

At 12:16 a.m., Officer Clift observed a male and female walk from the business complex through an opening in the chain link fence and approach the vehicle. Clift advised

1 dispatch of these events, and observed the female enter the driver's side of the car and the
2 male, the front passenger's side. *Id.*, 1-2.

3 Officer Clift heard the vehicle engine start, and began to approach the vehicle from
4 the rear. He was expecting backup officers to arrive, but decided to make his presence
5 known to the driver of the vehicle. As he walked toward the vehicle, he drew his service
6 weapon, which is common practice when dealing with occupied stolen vehicles. The
7 parking lot was dark, and with his flashlight in his other hand, he shined it toward and into
8 the stolen vehicle. *Id.*, 2.

9 As he approached the vehicle, he yelled "Police. Stop." and he saw both occupants
10 of the car turn their heads backward toward him. The vehicle began to back up and again
11 he yelled "Police. Stop." He then heard a loud noise and the sound of air escaping, which
12 he believed to be the front tire being punctured by the "rat trap". He yelled again "Police.
13 Stop." but the vehicle continued to back toward him. The vehicle was being backed slowly,
14 but did not come within ten feet of the officer's location. *Id.* His report then recounts:

15 The vehicle then accelerated forward and made a sharp turn to the right
16 and did a sharp U-Turn. At this point I was on the passenger side of the
17 vehicle, approximately fifty feet away. I was still backing through the
18 parking lot with my flashlight and duty weapon pointed at the vehicle. I
19 continued to yell for the vehicle to stop. The vehicle then accelerated
20 through the parking lot. It appeared that the vehicle was going to drive past
21 me and towards the exit of the parking lot on my right side. I was
22 continuing to walk backwards through the parking lot at a fast pace. The
23 vehicle then suddenly turned directly towards me and accelerated. I
24 continued to yell for the vehicle to stop and the vehicle continued towards
25 me. It appeared that the vehicle was traveling at approx. 15-20 miles per
26 hour. I could hear the vehicle motor revving as it continued to get closer to
27 my location. I could see that the female driver was looking directly at me. It
was very apparent to me that the suspect was now trying to hit me with the
vehicle. If the vehicle would have continued on its route without turning
towards me, the vehicle would have been able to drive safely around me and
reach S.E. Kent Kangley Road.

As the driver continued to accelerate driving directly toward me, I
feared that the driver was going to hit me with the vehicle and either
seriously injure or kill me, so I began firing my duty weapon at the vehicle.
At that point the vehicle was approx. 10-15 feet of my location and
approaching quickly. When I began firing, the vehicle swerved to the right.

1 When the vehicle came to a stop, I was standing approx. 10 feet directly east
2 of the driver's side door.

3 *Id.*

4 In an interview with investigators, Officer Clift stated:

5 . . . She backs up a little bit as I keep yelling reversing my direction . . . I
6 don't know how far she backs up, but then she whips a u-turn, comes this
7 way (pointing at diagram) as I'm backing up through here, at this point
8 she's coming through the lot, I notice that she's way on my right side.
9 Just assume that she's just gonna drive around me, and head towards the,
10 uh, entrance. And she just turns her vehicle and comes directly at me.

11 *Exhibit B*, 5. He explained that as the vehicle was moving, and he was walking backwards,
12 "Just trying to get away." *Id.*, 6-7. He was not trying to block her exit or get to his car. At
13 some point as the car moved through the lot, he believed she (the driver) "turn[ed] right at
14 me." *Id.*, 7. Indeed, in a radio transmission he made as events were unfolding, Clift said
15 "[T]he tire's flat and they're driving right at me." *Exhibit C*, 8. He felt he had to shoot at
16 the driver to either stop the vehicle or get it to change direction.

17 Officer Clift aimed at the driver; specifically, at the driver's upper body. *Exhibit D*,
18 24. Clift believes the shots were fired in rapid succession in "[p]robably a second."
19 *Exhibit D*, 23. He was aware, after the fact, that he shot through the driver's window, but
20 stated "in my mind she was still a threat to me," when he fired the third shot. He explained:

21 **Q.** Why would you shoot at the car when it's not coming at you?

22 **A.** It's all action and reaction. I'm reacting to her action and I'm
23 shooting. I'm still moving, she's moving and I just, the last one just
24 went through the window.

25 **Q.** When you say reactions and actions and reactions, what actions were
26 there that caused you to shoot through the driver's side window when
27 she is no longer coming at you?

A. I'm continuing to fire, she's moving and I'm moving. This is an
event that's not me and you standing here. This is moving, she's
driving at me, I'm trying to get out of the way. It all happened
probably within a second.

Id., 49. He stopped firing because the driver was no longer a threat. *Id.*, 48.

Shortly after he fired the shots, Officer Clift radioed and advised that shots had been
fired and requested medics. Seconds later, Officer Clift's backup officers arrived. Plaintiff

1 and Ms. Morehouse were taken from the vehicle and provided medical treatment. *Exhibit*
 2 *A, 2.*

3 Officer Rodd Joseph was the first backup officer to arrive at the scene. As he was
 4 driving into the parking lot, he heard a series of 3 shots in rapid succession. He estimates
 5 that all 3 shots were fired in 2 seconds or less. *Declaration of Rodd Joseph, p. 2.* Sgt. Bob
 6 Crouch, an accident reconstructionist with the Auburn Police Department, calculated that at
 7 the point the vehicle began to turn toward the direction of Officer Clift, it was only 1.6 – 2.1
 8 seconds from Clift’s location. Thus, Officer Clift had very little time to react to the
 9 imminent danger of being run over by the approaching vehicle. *Declaration of Bob Crouch.*

10 **B. Deposition of Plaintiff Tubar.**

11 Plaintiff Nicomedes Tubar was deposed on January 19, 2006. He testified that he
 12 lived in an apartment near the parking lot where the shooting occurred. *Tubar dep., 6, 8.*
 13 Heather Morehouse, the driver of the stolen vehicle, also lived at the complex near where
 14 Tubar lived. *Tubar dep., 8 – 9.* Tubar would occasionally see Morehouse and had watched
 15 television in her apartment. *Tubar dep., 10 – 11.* Plaintiff reviewed a statement he gave
 16 police prior to his recent deposition and agreed that its contents were true and correct to the
 17 best of his knowledge. *Tubar dep., 14 – 16 (11 – 15).* On the day before the shooting,
 18 Morehouse told Tubar she had a “new car”. *Tubar deposition exhibit 1, p. 1.* Later that
 19 night, he returned around 11:30 p.m. and found Morehouse outside smoking. *Id.* He
 20 accepted her invitation to come to her apartment for a drink. *Id., 2.* Shortly, the
 21 conversation turned to cigarettes, and Morehouse asked whether Tubar would go with her
 22 to a nearby store to buy some, commenting “We’ll take my car, it’s fast.” *Id., 2.*

23 They walked toward her car parked on the “other side of the complex” and got in.
 24 Morehouse removed some items from the front passenger seat so Tubar could sit there, as
 25 the Officer described. *Tubar dep., 17.* As Morehouse was backing up, plaintiff saw a
 26 bright light and thought it was a security guard “directing [them] out of the parking lot.”
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1 *Tubar* dep., Exhibit 1, p. 3. The person was wearing dark clothes, holding a flashlight “just
2 above the shoulder”, but Tubar “didn’t really pay attention to it.” *Id.*, 17 – 18.

3 He describes lighting in the parking lot as “minimal lighting” and “kind of dark.”
4 *Id.*, 28. He could not recall whether Morehouse was using the car’s headlights. *Id.*, 29. He
5 testified that he was not aware the car’s tire was punctured or flat as the car was moving.
6 He described the driving as a “typical” drive. He could not say how fast Morehouse was
7 driving. *Id.*, 36 – 39. Plaintiff agrees with the officer’s description that before the car
8 moved, he turned around and looked back at the officer (“security guard”) as the flashlight
9 was shining into the car. He had no recollection of seeing the officer/security guard after
10 the car began moving forward until after he was shot. *Id.*, 37, 43.

11 Morehouse then drove forward and Tubar heard “a shot” and “blurrily” saw the
12 officer standing by the driver’s door. Tubar stated he “heard no warning shot.” He heard
13 “a minimum of one, maybe two, shots”. *Id.*, p. 4. Tubar clearly states that *after* he heard
14 the noises, which by the time of his deposition he described as “two noises, two or three”,
15 then Morehouse slammed on the brakes:

16 After those noises, she slammed on the brakes, glasses were flying
17 everywhere. She seemed startled really kind of freaked out and surprised.

18 *Tubar* dep., 18 (11-18).

19 It took a few moments for Tubar to realize he had been shot. He claims he did not
20 realize until later that the person he had seen was a police officer. *Id.*, 18 – 19. Tubar was
21 shot in the upper back, shoulder area.

22 At the hospital, a police who was sent to interview plaintiff reports that Tubar stated
23 that Morehouse accelerated toward the uniformed male and that it seemed Morehouse was
24 trying to hit him. Tubar denied making this statement in his deposition, claiming that he
25 did not see the person after the car began moving forward and before he was shot. *Id.*, 59 –
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60. Tubar's descriptions of the gun shots are indicative of sounds which, from his perspective, came very close together.

A. . . . I don't even recall, you know, the noises, how many exactly. All I remember is noises were heard, she slammed the brakes, and then I can't move. That's the only thing I can clearly remember.

Q. Did this all happen pretty quickly?

A. Yeah, that's correct.

Tubar dep., 39.

Ms. Morehouse's braking was significant enough for Tubar's body to be moved "forward." *Id.*, 39. He has no recollection of how much time elapsed between the first and second gun shots. He really could not say whether there was a third shot or not. *Id.*, 40. He has no knowledge whatsoever of which shot may have hit him. He describes the time that elapsed from when the car moved from its parked location to being stopped after shots were fired as not long and not far.

Q. Do you know the amount of time it took for the car to get from where it was parked to where it was stopped?

A. I don't know.

Q. And that includes the back up time?

A. Yeah.

Q. You don't know?

A. It didn't seem that long to me, it didn't seem that far, yeah.

Tubar dep., 44; see also, *Tubar dep.*, 46.

C. Physical Evidence at the Scene.

Auburn Police Department investigators obtained a "total station" of the incident scene, including precise measurements of the area and placement of objects and evidence at the scene. *Declaration of Randey Clark*. Investigators prepared a to-scale diagram depicting information at the scene, including a visible mark on the pavement left by the rim of the flattened tire that provides evidence of the path the vehicle took from near where Morehouse began to drive forward, after backing the car. *Id.* Physical evidence of the vehicle establishes that one of the shots Officer Clift fired hit the hood of the car on the driver's side. Another bullet entered the windshield on the driver's side, and proceeded at

1 an angle somewhat less than 90 degrees to the front of the vehicle. *Id.* The bullet impacted
 2 through the vehicle's back seat behind the driver, evidently missing Ms. Morehouse by
 3 inches. The third shot was fired just as the car rapidly turned to its right as described by
 4 Officer Clift. The last bullet entered the driver's side window, missing Ms. Morehouse, but
 5 presumably hitting plaintiff in the left shoulder. *Id.*

6 As the vehicle was backing, it was not a threat to Officer Clift. And, as it began
 7 moving forward and turning to its right (in the process of making a u-turn), it was not
 8 initially a threat. Indeed, Officer Clift thought the vehicle would exit the parking lot by
 9 going around him to his right. Suddenly, everything changed. The vehicle turned and
 10 began traveling directly at him. At that point, even assuming normal acceleration, Officer
 11 Clift had only 2 seconds until the car would hit him. He had no way of predicting the
 12 driver's behavior, and no means of protecting himself – except firing in an attempt to stop
 13 the driver.

14 **III. ISSUES PRESENTED**

- 15 1. Has Plaintiff alleged a Fourth Amendment “seizure” since Officer Clift did
 16 not intentionally fire his weapon at Plaintiff?
- 17 2. If no Fourth Amendment “seizure” occurred may Plaintiff nevertheless
 18 proceed on a Fourteenth Amendment substantive due process theory?
- 19 3. If the Court concludes a Fourth Amendment seizure occurred, is Officer
 20 Clift nevertheless entitled to qualified immunity from suit?

21 **IV. EVIDENCE RELIED UPON**

- 22 1. Declaration of Mary Ann McConaughy, with excerpts from deposition of
 23 Nicomedes Tubar, III
- 24 2. Declaration of Jason Clift, with Exhibits as follows:
 25 A. 3-page statement of Officer Jason Clift;

1 B. Excerpts from transcribed interview with Officer Jason Clift conducted
by Detective Randey Clark;

2 C. Transcript of radio transmissions by Officer Clift and others; and

3 D. Excerpts from transcript of criminal defense attorney Todd Maybrown's
4 March 16, 2004 interview with Jason Clift.

5 3. Declaration of Randey Clark;

6 4. Declaration of Bob Crouch; and

7 5. Declaration of Rodd Joseph.

8 V. AUTHORITY

9 A. The First Step in Applying Qualified Immunity Relies upon a Precise Identification of the Constitutional Violation Alleged.

10 To succeed in a §1983 civil rights action, a plaintiff must show (1) that the conduct
11 complained of was committed by a person acting under color of state law; and (2) that the
12 conduct deprived the plaintiff of a federal constitutional or statutory right. *Wood v.*
13 *Ostrander*, 879 F.2d 583, 587 (9th Cir. 1989).

14 However, not every constitutional violation automatically results in liability.
15 Government officials performing discretionary functions are protected from liability for
16 civil rights violations except when their conduct violates "clearly established" constitutional
17 rights about which a reasonable official should know. *Harlow v. Fitzgerald*, 457 U.S. 800,
18 818, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982). The Supreme Court has outlined a two-step
19 process for applying qualified immunity, "the first inquiry must be whether a constitutional
20 right would have been violated on the facts alleged," and second, assuming the violation
21 could be proved, whether the rights was "clearly established" under the law at the time.
22 *Saucier v. Katz*, 533 U.S. 194, 200, 121 S. Ct. 2151, 150 L.Ed.2d 272 (2001).

23 The Supreme Court has repeatedly stated that proper sequence of analysis in
24 determining qualified immunity is first to establish whether the plaintiff has alleged a
25 deprivation of a constitutional right at all. Only when it can conclude that a constitutional
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violation can be made out on the facts alleged, does the court then address whether or not the “right allegedly implicated was clearly established at the time of the events in question.” *Siebert v. Gilley*, 500 U.S. 226, 232, 114 L.Ed.2d 277, 111 S. Ct. 1789 (1991).

B. Plaintiff Has Not Alleged a Viable Fourth Amendment Claim Because Officer Clift Did Not Intentionally Fire His Weapon at Plaintiff.

Plaintiff’s complaint alleges claims under both the Fourth and Fourteenth Amendments. The first step in any 42 U.S.C. §1983 is to identify the specific, constitutional right allegedly infringed. *Armendariz v. Penman*, 75 F.3d 1311, 1319-20 (9th Cir. 1996). The Supreme Court held in *Graham v. Connor*, 490 U.S. 386, 104 L.Ed.2d 443, 109 S. Ct. 1865 (1989) that, generally, claims of excessive force against officers engaged in apprehending law violators are properly analyzed under the Fourth Amendment, not the more subjective standard of Fourteenth Amendment substantive due process. *Armendariz, supra* at 319. The Fourth Amendment provides that the “right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated . . .”

The Fourth Amendment does not apply to persons unintentionally injured by police force. The Supreme Court has ruled a Fourth Amendment “seizure” only occurs when the government actor takes deliberate action and effectively seizes the plaintiff through “means intentionally applied.” *Brower v. County of Inyo*, 489 U.S. 593, 596-7, 103 L.Ed.2d 628, 109 S. Ct. 1378 (1989). The actions of the officer “must be willful.” *Id.* That is, “through means intentionally applied.” *Id.*, at 597. Thus, when an officer accidentally struck and killed two persons on a motorcycle who were fleeing police apprehension, no seizure occurred even though the officer was engaged in trying to apprehend the fleeing subjects. *Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 140 L.Ed.2d 1043 (1998).

In this case, the officer was aiming at the driver, Ms. Morehouse, not the passenger plaintiff Tubar, when the bullet intended for Ms. Morehouse broke through the driver’s side

1 window, narrowly missed Morehouse, simultaneously with Morehouse's rapid turning and
2 braking of the car as described by both Tubar and Officer Clift.

3 If Officer Clift did not "seize" plaintiff Tubar in a manner consistent with the
4 meaning of the term in the Fourth Amendment, then no violation of Fourth Amendment
5 rights occurred. The question presented by this case is whether the officer's shooting at the
6 driver, Ms. Morehouse, and accidentally striking the passenger, plaintiff Tubar resulted in a
7 Fourth Amendment "seizure." It did not.

8 Officers who intentionally shoot at a suspect, but miss and hit an uninvolved
9 bystander, are not liable to the bystander for Fourth Amendment violation. *See, Rucker v.*
10 *Harford County*, 946 F.2d 278, 281 (4th Cir. 1991).

11 [O]ne is "seized" within the fourth amendment's meaning only when one is
12 the *intended object* of a physical restraint by an agent of the state. [emphasis
in original]

13 Similarly, when shots fired at a suspect outside a vehicle penetrated into the car and
14 hit a person the officers did not know was present in the car, there was not a "seizure."
15 *Claybrook v. Birchwell*, 199 F.3d 350 (6th Cir. 2000). *But see, Fisher v. Memphis*, 234 F.3d
16 312 (6th Cir. 2000) (an officer shooting at a suspect vehicle, missing the driver but hitting a
17 passenger, had seized the passenger); *Vaughan v. Cox*, 264 F.3d 1027 (11th Cir. 2001).

18 In *Childress v. City of Arapaho*, 210 F.3d 1154 (10th Cir. 2000), hostages in a
19 vehicle were injured when police officers attempted to stop the vehicle by firing shots. The
20 court rejected plaintiffs' arguments that the officers' deliberate firing into the vehicle,
21 knowing of the presence of the woman and her toddler daughter, was a "seizure" even
22 though the shooting was willful. The court observed that the officers intended to restrain
23 the mini-van and the fugitives, not the plaintiffs. The injuries to plaintiffs were not
24 unconstitutional but were "accidental effects of otherwise lawful conduct." *Id.*, at 1157.

25 A similar result was reached in *Medeiros v. O'Connell*, 150 F.3d 164, 169 (2d Cir.
26 1998) and in *Landol-Rivera v. Cosme*, 906 F.2d 791 (1st Cir. 1990), where the court noted
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1 that officers unquestionably had a Fourth Amendment right to seize an armed robber by
2 shooting him after he had taken plaintiff hostage. Nevertheless, the court concluded that
3 accidentally shooting plaintiff, who was in the vehicle with the robber, did not constitute a
4 seizure of plaintiff, thus rejecting plaintiff's Fourth Amendment claim.

5 We reject the notion that the "intention" requirement is met by the
6 deliberateness with which an action is taken. A police officer's deliberate
7 decision to shoot at a car containing a robber and a hostage *for the purpose*
of stopping the robber's flight does not result in the sort of willful detention
of the hostage that the Fourth Amendment was designed to govern.

8 *Landol-Rivera, supra* at 795.

9 The Court referred to language in *Brower v. County of Inyo, supra* where in the
10 Supreme Court noted the Fourth Amendment "addresses misuse of power" and not
11 accidental effects of otherwise lawful government conduct. 109 S. Ct., at 1381.

12 In summarizing the application of these principles, the *Landol-Rivera* court noted
13 that what is "significant" about the cases is that intervention directed at a specific individual
14 furnishes the basis for a Fourth Amendment claim. *Landol-Rivera*, at 796.

15 The results in these cases may fuel an argument that when the unintended target of a
16 bullet is a hostage, there is no Fourth Amendment seizure; but when he or she is a suspect
17 (which the officer did not know concerning Tubar) or any other non-hostage, a seizure
18 occurs. The trouble with this analysis is that it is wholly arbitrary. It seems preposterous to
19 suggest that in the scant seconds when Officer Clift perceived the car to be a threat and
20 began firing that he had reason or opportunity to evaluate his options based upon the
21 passenger's status. Why should the initial determination that a Fourth Amendment
22 violation has, or may have occurred, rest on such a haphazard (and often not ascertainable)
23 distinction?

24 In this case, Officer Clift was attempting to protect his own life when he shot at the
25 driver, Ms. Morehouse. He shot at Morehouse to end the threat posed by her driving, a
26 purpose not served by shooting the passenger. Plaintiff Tubar, the unintended recipient of
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1 force, was not seized within the meaning of the Fourth Amendment. It cannot be said that
 2 the Fourth Amendment's "purpose" to address "misuse of power" is served when an
 3 unintended consequence, i.e., hitting Tubar, is redressed by §1983 liability.

4 Here, Clift did not intend to shoot Tubar; he intended to shoot the driver, Ms.
 5 Morehouse, to stop the car that was bearing down on him. The reasoning of *Brower v. Inyo*
 6 and *Sacramento v. Lewis*, is consistent with a determination that, here, the passenger Mr.
 7 Tubar was not seized because he was not the intended target of the officer's shot.

8 **C. If No Fourth Amendment "Seizure" Occurred, the Court Must Still Determine**
 9 **Whether a Fourteenth Amendment Claim is Alleged on These Facts.**

10 If this Court concludes that no "seizure" occurred, that does not end the
 11 constitutional inquiry. The Court must then consider if plaintiff has a claim under the
 12 Fourteenth Amendment, which provides "no State shall ... deprive any person of life,
 13 liberty, or property, without due process of law."

14 Substantive due process considerations must be addressed when the Court has
 15 deemed that the Fourth Amendment does not apply to the facts presented. *Sacramento v.*
 16 *Lewis*, 523 U.S. 833, 843-844, 118 S. Ct. 1708, 140 L.Ed.2d 1043 (1998).

17 [I]n a due process challenge to executive action, the threshold question is
 18 whether the behavior of the governmental officer is so egregious, so
 outrageous, that it may fairly be said to shock the contemporary conscious.

19 Only the most egregious circumstances can be deemed violative of the
 20 Fourteenth Amendment. The constitution does not guarantee "due care on
 21 the part of state officials" and negligently inflicted harm is below the
 threshold of constitutional due process.

22 The Supreme Court has repeatedly expressed a reluctance to "expand the concept of
 23 [Fourteenth Amendment] substantive due process." *Sacramento v. Lewis*, 118 S. Ct. at
 24 1715. In *Lewis*, 118 S. Ct. at 1711-1712, the Court ruled that an officer who crashed into a
 25 fleeing suspect, killing him was not liable for violation of Fourteenth Amendment rights,
 26 even if he did act in "conscious disregard" for the young man's life. Instead, the Court held
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1 that “in such circumstances, only a *purpose to cause harm unrelated to the legitimate object*
 2 *of arrest* will satisfy the element of arbitrary conduct shocking to the conscience, necessary
 3 for a due process violation.” (emphasis supplied).

4 In this case, the officer’s actions took place in a rapidly-evolving circumstance
 5 where careful consideration was not practical. *See Lewis*, 118 S. Ct. at 1719 (“As the very
 6 term “deliberate indifference” implies, the standard is sensibly employed only when actual
 7 deliberation is practical.”) Police officers responding to situations of extreme emergency
 8 who do not intend to commit harm, unrelated to the legitimate use of force necessary to
 9 protect the public or themselves, do not commit Fourteenth Amendment violations.
 10 *Moreland v. Las Vegas Police*, 159 F.3d 365, 372 (9th Cir. 1998). Officer Clift’s actions do
 11 not rise to the level of a Fourteenth Amendment violation. He responded to an extreme
 12 emergency (reasonable fear of being run over by Morehouse) with legitimate use of force to
 13 protect himself and with no intent whatever to harm plaintiff or anyone beyond this use of
 14 force against Morehouse.

15 **D. Even if a Fourth Amendment “Seizure” Occurred, Officer Clift is Entitled to**
 16 **Qualified Immunity From Suit.**

17 If the Court finds a “seizure” of Mr. Tubar occurred, the issue then turns to whether
 18 the officer’s use of force under the circumstances was nevertheless “reasonable.” If it was,
 19 no violation occurred and there is no need to consider whether qualified immunity applies.
 20 Yet, even if the officer decision is constitutionally “unreasonable,” he may nevertheless be
 21 entitled to qualified immunity if he “reasonably misapprehends the law governing the
 22 circumstances [he] confronted.” *Brosseau v. Haugen*, 543 U.S. 194, 125 S. Ct. 596, 599,
 23 160 L.Ed.2d 583 (2004). And if the law did not put the officer on notice, his conduct in a
 24 particular situation would be clearly unlawful, summary judgment based on qualified
 25 immunity is appropriate. *Id.*; *see, Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89
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1 L.Ed.2d 271 (1986)(qualified immunity protects “all but the plainly incompetent or those
2 who knowingly violate the law.”)

3 Clearly, it is not *any* use of force by an officer that results in a Fourth Amendment
4 violation, but only the use of force is unreasonable under the circumstances presented. The
5 Court must consider the “threshold question:” “Taken in a light most favorable to the party
6 asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional
7 right?” *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L.Ed.2d 272. Where an
8 “officer has probable cause to believe that the suspect poses a threat of serious physical
9 harm, either to the officer or to others, it is not constitutionally unreasonable to prevent
10 escape by using deadly force.” *Brosseau v. Haugen*, 125 S. Ct. at 598.

11 The undisputed facts taken in a light most favorable to plaintiff are as follows:
12 Shortly before midnight on June 25, 2003, Officer Clift confirmed the presence of a stolen
13 Kia automobile near where another stolen car had been recovered previously. The Kia had
14 been stolen one day before. He observed that the front license plate had been removed
15 (consistent with the officer’s experience of practices of car theft suspects). A license plate
16 was visible inside the car. Drug paraphernalia was visible in the car, and the car was warm
17 having been driven recently. Officer Clift placed a tire deflation device under the front
18 passenger tire.

19 A short time later, Morehouse and Tubar approached and got in the car. The time
20 was just after midnight on June 26. The officer notified back up officers that persons were
21 approaching the car, and learned that back up officers were nearby and en route. The
22 officer approached the rear of the car from a hidden position some distance away. He
23 carried his flashlight which he shined into the rear windshield, and he had his service
24 weapon drawn which is common practice when confronting an occupied stolen car.

25 It is undisputed that both occupants were aware of the presence of a person with a
26 light in the parking lot. Both occupants of the car noticed the light, and the officer knew he
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1 had been seen because Mr. Tubar admits he turned and looked in the officer's direction, as
2 the officer described. The officer loudly announced "Stop. Police." Neither occupant of
3 the vehicle heard this command to stop, but Officer Clift did not know this and thought the
4 vehicle's occupants did hear his command because they had looked back at him. The
5 officer was wearing his department-issued police uniform. Neither occupant of the car
6 realized he was a police officer, but the officer did not know this.

7 The car was backed out slowly for some distance. The officer was not apprehensive
8 about the backing maneuver. When the car had been backed far enough to permit Ms.
9 Morehouse to drive forward, she did so driving in a right-turning motion. During backing,
10 the front passenger tire was punctured by the deflation device and flattened quickly enough
11 that the tire rim made a visible mark on the pavement that documents most of the vehicle's
12 path of travel as it was driven forward to the point where it stopped.

13 As the car began to back up, Officer Clift stopped moving toward the vehicle and
14 began to walk backwards away from the car. The officer noticed the car turning to its right,
15 and initially he was located on the passenger side of the vehicle. At first, the officer
16 believed the car was going to drive around him staying to his right and that it would drive
17 out the parking lot exit. Suddenly, the officer perceived that the car was being driven
18 directly toward him. The driver Ms. Morehouse was aware the flashlight was directed into
19 the front windshield of the car, although she denies driving at the officer intentionally.
20 Officer Clift had at most about two seconds to decide what to do and to act.

21 He radioed that the car was coming right at him, and shortly thereafter fired three
22 bullets at the car. The first two bullets struck the front of the car, and confirm the officer's
23 description that the car was driving in his direction. Both occupants of the car testified that
24 Ms. Morehouse began braking due to the noise of gunshots or because glass was breaking.
25 She slammed on the brakes and Tubar was thrown forward by the braking action. While he
26 was firing, the officer perceived that the car swerved to its right (as he moved to his right)

1 and thus veered away from him. The third bullet broke the driver's window somehow
2 missing Ms. Morehouse and striking Mr. Tubar in the upper back of his shoulder —
3 perhaps because he was thrown forward by the braking action. This is consistent with a
4 pattern of events occurring in rapid succession in a split-second time period. The officer
5 stopped firing when he perceived the car was no longer a threat to him.

6 Tubar and Morehouse also concede everything happened quickly. They also admit
7 that parking lot was relatively small and the distances involved were, as Tubar stated, not
8 "that far."

9 According to the officer, the car was accelerating toward him. This fact is disputed;
10 Tubar states the car was accelerating in a normal fashion. Viewing the facts in Tubar's
11 favor, and assuming normal acceleration, as the car traveled toward the officer, he had only
12 seconds to react once he perceived it to be a threat.

13 The standard applied to the officer's conduct is the "objective reasonableness"
14 standard set forth in *Graham v. Connor*, 490 U.S. 386, 104 L.Ed.2d 443, 109 S. Ct. 1865
15 (1989). Determining whether the officer's conduct was reasonable "is not capable of
16 precise definition or mechanical application." And, because "police officers are often
17 forced to make split second judgments – in circumstances that are tense, uncertain, and
18 rapidly evolving – about the amount of force that is necessary in a particular situation" the
19 reasonableness of the officer's belief as to the appropriate level of force should be judged
20 from the on-scene perspective. *Graham v. Connor*, at 396-397; *see also*, *Saucier v. Katz*,
21 533 U.S. 194, 200, 121 S. Ct. 2151, 150 L.Ed.2d 272 (2001). The Supreme Court
22 "cautioned against the '20/20 vision of hindsight' in favor of deference to the judgment of
23 reasonable officers on the scene." *Saucier v. Katz*, *supra*, 533 U.S. at 205.

24 Here, there is no dispute that the car was being driven directly at the officer when he
25 fired the initial shots. Plaintiff will certainly argue that the final shot, into the driver's side
26 window, was not reasonable because of the officer's position with respect to the car. Office
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1 Joseph states that all shots were fired in two seconds or less. Nevertheless, it is obvious
2 that given the extremely brief time period in which the officer was forced to act,
3 distinguishing the third shot from the first two shots is not a reasonable basis for pinning the
4 officer with a Fourth Amendment Constitutional violation given the realities of perception -
5 reaction time and the obvious stress of the events. The officer's actions, under the
6 circumstances of this case, were not unreasonable and thus did not violate Mr. Tubar's
7 constitutional rights. Officer Clift was faced with what he perceived to be a life or death
8 situation that took place in mere seconds.

9 If the Court concludes that no constitutional violation is made out on these facts, the
10 inquiry stops here. If the Court, instead, determines that a constitutional violation may have
11 occurred, the Court must still consider whether the officer is entitled to qualified immunity.

12 Even if an officer has violated a subject's constitutional rights, the law relating to
13 the circumstances was clearly established such that a reasonable officer in Officer Clift's
14 position would have known he was violating Mr. Tubar's rights. The Supreme Court has
15 specifically stated that the reasonableness inquiry for determining whether a violation may
16 have occurred is not "merely duplicative" to the qualified immunity question. "The
17 inquiries for qualified immunity and excessive force remain distinct." *Saucier v. Katz*, 533
18 U.S. at 204.

19 The qualified immunity inquiry, on the other hand, has a further
20 dimension. The concern of the immunity inquiry is to acknowledge that
21 reasonable mistakes can be made as to the legal constraints on particular
22 police conduct. It is sometimes difficult for an officer to determine how the
23 relevant legal doctrine, here excessive force, will apply to the factual
24 situation the officer confronts. An officer might correctly perceive all of
the relevant facts but have a mistaken understanding as to whether a
particular amount of force is legal in those circumstances. If the officer's
mistake as to what the law requires is reasonable, however, the officer is
entitled to the immunity defense.

25 *Saucier v. Katz*, 533 U.S. *supra* at 205.
26
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1 Because the Court must determine whether or not the officer had “fair notice” that
2 his conduct was unlawful, reasonableness must be judged “against the backdrop of the law
3 at the time of the conduct. Careful attention must be paid to the facts and circumstances of
4 each particular case.” *Id.* “If an officer, reasonably but mistakenly believed that a suspect
5 was likely to fight back, for instance, the officer would be justified in using more force than
6 in fact was needed.” *Id.*

7 If the law at that time did not clearly establish that the officer’s conduct would
8 violate the Constitution, the officer should not be subject to liability or, indeed, even the
9 burdens of litigation.” *Id.*, at 599. Plaintiff bears the burden of showing that the right
10 claimed to have been violated was “clearly established” at the time of the alleged action.
11 *Collins v. Jordan*, 110 F.3d 1363, 1369-79 (9th Cir. 1997).

12 The Supreme Court has repeatedly stressed the importance of looking at “the
13 specific context of the case.” *Id.* This is so because the “contours of the right” in question
14 must be sufficiently clear that “a reasonable official would understand that what he is doing
15 violates that right”. *Brosseau v. Haugen, supra*, 125 S. Ct. at 599, (citing *Anderson v.*
16 *Creighton*, 483 U.S. 635, 97 L.Ed.2d 523, 107 S. Ct. 3034 (1987)).

17 Thus, in this context, plaintiff must cite factual scenarios closely similar to this case
18 decided before June 26, 2003 (the date of this incident) which demonstrate that, at the time
19 Officer Clift fired, any reasonable officer should have known he was violating Mr. Tubar’s
20 rights. Plaintiff cannot do so.

21 *Brosseau v. Haugen, supra*, is instructive although factually distinct. It
22 demonstrates the requisite factual specificity for the application of qualified immunity.
23 Officer Brosseau shot at (and hit) a suspect in an escaping vehicle because she feared his
24 driving would injure nearby persons. The officer was not fearful for her own safety. The
25 Ninth Circuit concluded the officer violated the suspect’s Fourth Amendment right, and that
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1 she was not entitled to qualified immunity. The Supreme Court reversed the decision on
2 qualified immunity.

3 The Court commented that it “expressed no view as to the correctness of the [Ninth
4 Circuit] decision on the constitutional question itself” — whether a Fourth Amendment
5 violation occurred. *Brosseau v. Haugen*, 125 S. Ct. at 598. The Court reviewed three cases
6 involving officers shooting at cars prior to the Haugen shooting to determine whether the
7 law was “clearly established.” It noted that the cases “taken together undoubtedly show
8 that this area is one in which the result depends very much on the facts of each case. None
9 of them squarely governs the case here; they do suggest that Brosseau’s actions fell in the
10 ‘hazy border between excessive and acceptable force.’” *Brosseau v. Haugen*, 125 S. Ct. at
11 600.

12 The only reasonably close case on its facts to this case is a Fourth Circuit case
13 decided more than two years *after* this shooting. In *Waterman v. Batton*, 393 F.3d 471 (4th
14 Cir. 2005), a suspect was shot as he traveled at a relatively low speed through a toll plaza.
15 Before entering the plaza, he failed to stop for a traffic stop then led officers on a ten
16 minute high speed chase during which he tried to run an officer off the road.

17 Police officers at the toll plaza were advised the car was coming their way. The
18 vehicle entered the toll plaza at a “normal speed” despite the prior pursuit. Officers at the
19 toll plaza emerged on foot from behind a concrete barrier with their weapons drawn. They
20 approached the vehicle from the front and passenger’s side, yelling for the driver to stop.

21 The scene was videotaped and showed that the car coasted for about one second at
22 11 mph; and when the vehicle ahead of it moved forward, the rear end of the suspect’s
23 vehicle “dipped down” and rose back up, indicating acceleration. At the time of the
24 acceleration, the officers’ distance from the vehicle varied from 16 to 72 feet. Although all
25 of the officers were positioned somewhat out of the vehicle’s direct path, “they stood only a
26 few feet to the passenger side” of the vehicle’s projected path. When the vehicle
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1 accelerated, the officers began to fire their weapons. The top speed attained by the vehicle
2 was 15 mph. The vehicle passed all the officers, avoiding them by several feet. The
3 officers continued to fire their weapons at the passenger side of the vehicle from behind. In
4 the approximate six-second period after the vehicle lurched forward, three officers fired a
5 total of eight rounds. The driver was killed by the gun fire.

6 The Fourth Circuit granted qualified immunity for the officers noting that numerous
7 considerations governed the perceived threat facing the officers. Nevertheless, “the critical
8 reality here is that the officers did not have even a moment to pause and ponder these many
9 conflicting factors.” *Waterman, supra*, at 478. The Court went on to hold that given all the
10 factors and “particularly the split-second nature of the decision”, the officers “had probable
11 cause to believe that Waterman’s oncoming vehicle posed an immediate threat of serious
12 physical harm” to at least some of the officers. *Id.* The Court reasoned that although the
13 officers could not be clear as to the driver’s intentions, just as Officer Clift could not have
14 known in this case, waiting to find out *could* have resulted in serious injury or death,
15 quoting another case – “the Constitution simply does not require police to gamble with their
16 lives in the face of a serious threat.” *Elliott v. Leavitt*, 99 F.3d 640, 641 (4th Cir. 1991). Of
17 course, Clift’s situation was more compelling in one regard — the Morehouse vehicle
18 clearly *was* being driven directly at him when he fired the first two shots.

19 The *Waterman* court recognized that despite the relatively slow speed of the vehicle,
20 depending on whether the driver would continue to accelerate or make a steering maneuver,
21 even a moment’s hesitation by officers would have meant the loss of a chance to defend
22 themselves. That was precisely Officer Clift’s dilemma.

23 The Court concluded that for the reasons stated, the officers’ perception of an
24 immediate threat – whether correct or not – “was clearly reasonable and therefore their
25 initial use of deadly force was justified.”
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1 The Court then addressed the shots fired after the vehicle had passed the officers.
 2 *Waterman* and this case differ, however, because in this case another issue is present:
 3 whether the split second timing of events and the fact that human perception-reaction is not
 4 instantaneous accounts for Clift's firing the third shot instead of representing a deliberate
 5 choice to fire when the threat was passed. The Court reviewed case law from a variety of
 6 circuits and addressed whether a separate analysis should be applied to later shots or
 7 whether such analysis represented an "artificial division in the sequence" of events that
 8 should not occur. The Court concluded that a separate analysis was appropriate without
 9 any consideration of perception – reaction time which is an issue in this case. The
 10 *Waterman* Court held that the unconstitutionality of subsequently fired shots was not
 11 clearly established at the time of the shooting.

12 After noting that "the existing authority must be such that the unlawfulness of the
 13 [police] conduct is manifest", the Court noted that whether or not the law is clearly
 14 established must be based on controlling authority in the jurisdiction in question or on a
 15 "consensus of cases of persuasive authority such that a reasonable officer would not have
 16 believed that his actions were unlawful." *Wilson v. Layne*, 526 U.S. 603, 617, 143 L.Ed.2d
 17 818, 119 S. Ct. 1692 (1999). No such authority exists in this case. Plaintiff cannot carry
 18 his burden of showing the law was "clearly established" when this shooting occurred and
 19 that any reasonable officer had "fair notice" that shooting under these circumstances
 20 violated Tubar's rights.

21 **E. Plaintiff Cannot Bootstrap His Claim That A Constitutional Violation**
 22 **Occurred Arguing That Some "Negligence" Or Allegedly Improper Police**
 23 **Activity Before The Shooting Resulted In A Situation Where The Force Was**
 24 **Required.**

25 Defendants anticipate that plaintiff may argue that even if the officer's decision to
 26 shoot was reasonable, decisions he made prior to the shooting got him into the situation,
 27 and for that reason his reasonable use of force becomes "unreasonable". In *Billington v.*

1 *Smith*, 292 F.3d 1177 (2001), the Ninth Circuit addressed a case where an off-duty police
2 officer decided to try to apprehend an extremely intoxicated suspect of a hit-and-run who
3 had just crashed his car, even though backup was not on-scene. The suspect became
4 extremely combative and a physical fight ensued during which the suspect grabbed the
5 officer's gun. During the melee, the officer shot and killed the suspect.

6 The Ninth Circuit agreed with the trial court's assessment that the officer had no
7 choice but to shoot, given the undisputed facts that the suspect was trying to gain control of
8 his weapon at that moment. But the Ninth Circuit went on to address the trial court's
9 determination that a genuine issue of material fact existed as to whether tactical errors made
10 by the detective *before the shooting* "made his reasonable use of force at that moment
11 unreasonable." *Id.*, at 1185. The Ninth Circuit reviewed its own prior authority and that of
12 other circuits. *Billington v. Smith*, *supra* at 1188-1191. The court noted that under some
13 circumstances an officer's provocative actions may be so unreasonable that they taint the
14 officer's subsequent use of force in the circumstances. *See, Alexander v. San Francisco*, 29
15 F.3d 1355, (9th Cir.1994). Such liability will only be imposed in rare and egregious
16 circumstances.

17 Officers are not required to always "avail themselves of the least intrusive means of
18 responding" at the risk of being saddled with civil rights liability. Plaintiff cannot avoid
19 summary judgment "by simply producing an expert's report that an officer's conduct
20 leading up to a deadly confrontation was imprudent, inappropriate, or even reckless." *Id.*,
21 at 1189. Recognizing the admonition in *Graham v. Conner*, *supra*, the court acknowledged
22 that the officer's actions must be judged from "the perspective of a reasonable officer on
23 the scene, rather than with the 20/20 vision of hindsight":

24 Our precedents do not forbid *any* consideration of events leading up to a
25 shooting. But neither do they permit a plaintiff to establish a Fourth
26 Amendment violation based merely on bad tactics that result in a deadly
27 confrontation that could have been avoided.

1 *Billington v. Smith, supra*, at 1190.

2 Even if the officer's pre-shooting decision-making could be deemed negligent and
3 could be considered a provocation that led to the use of force, this would still "not
4 transform an otherwise reasonable subsequent use of force into a Fourth Amendment
5 violation." *Id.*

6 VI. CONCLUSION

7 For reasons stated herein, the Court should rule that no violation of Plaintiff's civil
8 rights occurred under the facts alleged by Plaintiff. No Fourth Amendment "seizure"
9 occurred here. For this reason, all civil rights claims, including municipal liability claims,
10 should be dismissed at this time. The case could then be remanded to state court for
11 resolution of state tort liability claims.

12 If the Court disagrees and believes that seizure did occur, Officer Clift acted
13 reasonably and therefore did not violate Plaintiff's Fourth Amendment rights. Finally,
14 qualified immunity should be applied to protect the officer from liability under the
15 unquestionably tense and rapidly-evolving circumstances of this case.

16 RESPECTFULLY submitted this 16th day of March, 2006.

17 KEATING, BUCKLIN & McCORMACK, INC., P.S.

18 s/ Mary Ann McConaughy

19 Steven L. Thorsrud, WSBA # 12841

20 Mary Ann McConaughy, WSBA # 8406

21 Attorneys for Defendants

22 Keating Bucklin & McCormack, Inc., P.S.

23 800 Fifth Avenue, #4141

24 (206) 623-8861

25 (206) 223-9423 Facsimile

26 mmcconaughy@kbmlawyers.com

DECLARATION OF SERVICE

I hereby certify that on March 16, 2006, I electronically filed Defendants' Motion For Partial Summary Judgment with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Timothy K. Ford.

s/ Jean Young

Keating Bucklin & McCormack, Inc., P.S.

800 Fifth Avenue, #4141

Seattle, WA 98104

(206) 623-8861

(206) 223-9423 Facsimile

jyoung@kbmlawyers.com